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Re: Applications of Caloosa Television
Corporation to Convert Low Power
Television Station WBSP-LP, Naples,
Florida to Class A Television Status
File Nos. BLTVA-20010712AIK; BLTVA-
20020520AAQ
Facility ID 64580

Application for Minor Modification of
WBSP-CA, Naples, Florida for
Displacement Relief
File Nos. BPTVA-20030418AAE

Joint Request for Approval of Settlement
Agreement between Caloosa Television
Corporation and Fort Myers Broadcasting
Company

Dear Counsel:

This is with respect to the Joint Request for Approval of Settlement Agreement filed by Fort Myers Broadcasting Company ("FMBC") and Caloosa Television Corporation ("Caloosa"), which seeks, *inter alia*, to dismiss FMBC's objections to Caloosa's application to convert LPTV station WBSP-LP, Naples, Florida to Class A Television status. Prior to the filing of the settlement request on April 28, 2003, FMBC, licensee of station WINK-TV, Fort Myers, Florida, had filed a Petition for Reconsideration or, in the Alternative, for Declaratory Ruling and Informal Objection, requesting reversal of the staff's August 11, 2001 grant of the application of Caloosa to convert low power television station WBSP-LP, Naples, Florida to Class A

Television status.¹ FMBC had alleged that station WBSP-LP was never eligible for Class A Television status, and that Caloosa's Class A license application was granted on the basis of erroneous information provided by Caloosa. FMBC also requested forfeiture of station WBSP-LP's license, pursuant to Section 312(g) of the Communications Act of 1934, as amended, claiming that the station should be considered as having been silent for a consecutive 12-month period. Caloosa opposed the petition and Post-Newsweek Stations, Florida, Inc., the licensee of WPLG-DT, Miami, Florida, filed comments in support of Caloosa.

Background. Caloosa acquired the construction permit for station WBSP-LP (previously station W09BS) in August of 1989. Commission records show that between 1995 and 1999, the station was silent the majority of the time due to equipment failure and loss of the station's transmitter site.² In its March 31, 1998 renewal application, Caloosa explained that:

WBSP-LP . . . last operated on August 8, 1997. Since that time, WBSP-LP has lost its transmitter site. WBSP-LP will be filing a request for a Special Temporary Authorization to operate from a different transmitter site, so that the station can return to the air on or prior to August 7, 1998, to avoid losing the station's license by operation of 47 USC § 312(g).

Caloosa applied for Special Temporary Authority ("STA") on July 16, 1998 to operate at a temporary site pending the procurement of a new transmitter site. That STA was granted July 23, 1998 for a period of six months, expiring on January 23, 1999. Caloosa informed the Commission that the station resumed broadcast operations on July 31, 1998 pursuant to the facilities authorized by that STA. Shortly thereafter, on August 7, 1998, the station ceased operations. Subsequently, Caloosa represented that the station had caused "substantial interference to cable channel 9 on the cable television system serving Naples, Florida." On September 15, 1998, the Commission granted WBSP-LP silent authority through December 15, 1998, and subsequently extended that date through September 1999, based upon Caloosa's representations that it was seeking a new transmitter site, and that the temporary site from which it had operated in July 1998 was not suitable, due to interference to the Naples cable system.

By letter dated July 30, 1999 -- 358 days after the date Caloosa last reported as the day the station ceased operations -- counsel for Caloosa stated that he had been advised that the station had resumed broadcast operations on June 14, 1999, but was forced off the air on June 22,

¹ In May 2002, Caloosa filed an application for a license to cover (File No. BLTVA-20020520AAQ) its construction permit for minor modification of its facilities (File No. BPTVL-20000918ADV). FMBC filed an informal objection on May 20, 2002, which makes the same arguments and requests the same relief as its Petition for Reconsideration. The construction permit, however, expired on April 25, 2004, and accordingly the license application and FMBC's informal objection will be dismissed as moot.

² Caloosa first notified the Commission of its equipment problems in July 1995 and was granted silent authority until October 7, 1995. Although Caloosa notified the Commission in May 1996 of the station's equipment failure, it resumed operations on August 13, 1996. On January 30, 1997, Caloosa again notified the Commission that the station was silent, but did not provide the date on which service was suspended.

1999 because of "massive transmitter failure."³ Subsequently, on May 23, 2000, Caloosa filed a STA request to operate at the site and with the facilities specified in the July 23, 1998 STA authorization, notwithstanding the fact that those facilities were reportedly inoperable due to cable interference concerns. At the request of the staff, Caloosa modified its STA request to reduce power, in order to avoid interference with the Naples cable system. The STA was granted and Caloosa reported that the station went on the air on June 17, 2000.

Meanwhile, on November 29, 1999, the Community Broadcasters Protection Act of 1999 ("CBPA") was enacted. The CBPA directs that Class A licensees be subject to the same license terms and renewal standards as full-power television licensees, and that Class A licensees be accorded primary status as television broadcasters as long as they continue to meet the requirements set forth in the statute for a qualifying low power station. To be eligible for Class A status, the CBPA requires that, during the 90 days preceding the date of enactment of the statute: (1) the LPTV station broadcast a minimum of 18 hours per day; (2) the station broadcast an average of at least 3 hours per week of programming produced within the market area served by the station; (3) the station be in compliance with the Commission's requirements for LPTV stations; and (4) from the date of its application for a Class A license, the station be in compliance with the Commission's operating rules for full-power television stations. The CBPA also empowered the Commission to find a low power television station qualified for Class A status upon a public interest finding. In implementing the CBPA, the Commission concluded that it would allow deviation from the statutory criteria only where deviations were insignificant or compelling circumstances were presented.⁴

On January 28, 2000, Caloosa filed a Statement of Eligibility for Class A Television status for WBSP-LP, wherein it represented that the station was "temporarily off the air due to equipment failure." By *Public Notice* released June 9, 2000, the Mass Media Bureau dismissed the statement as materially deficient, and Caloosa filed a timely petition for reconsideration, arguing that the Bureau's action dismissing its statement of eligibility did not take into account the fact that station WBSP-LP had been operating as a low power television station for "most of the decade of the 1990s." On reconsideration, the Bureau reversed its dismissal of Caloosa's eligibility statement, relying on Caloosa's representation that it was off the air during the pertinent time period due to "equipment failure," and that prior to such failure, WBSP-LP had been simulcasting the programming of commonly-owned, same market station WEVU-LP, which has been found eligible for Class A status.⁵ Caloosa filed an application to convert its low power television construction permit facilities to Class A facilities on July 12, 2001, and the application was granted on August 11, 2001.⁶

³ Counsel did not indicate the site from which, or the other authorized facilities which with, the station operated during this period.

⁴ See *Report and Order, Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6369 (2000), *recon. granted in part*, 16 FCC Rcd 8244 (2001).

⁵ See *Letter from Barbara A. Kreisman, Chief, Video Services Division, to Mr. George E. DeVault, Jr.* (August 11, 2000).

⁶ File No. BLTVA-20010712AIK.

FMBC argued, on reconsideration, that assuming station WBSP-LP returned to the air for the eight-day period from June 14 to June 22, 1999, those operations were unauthorized since at the time counsel reported that Caloosa had returned the station to the air, its previous STA to operate from the temporary site, which had resulted in interference to the Naples cable system, had expired on January 23, 1999. FMBC maintained that the station should have been considered as being off-air for the 19-month period from January 23, 1999 through June 20, 2000 for purposes of Section 312(g) of the Act. Accordingly, FMBC requested that station WBSP-LP's Class A Television license be rescinded, its Class A Television applications dismissed, its low power television license deemed forfeited by operation of law, and its call sign deleted. In response, Caloosa argued that, *inter alia*, Section 312(g) did not apply in this case, because WBSP-LP had never been off the air for 12 consecutive months, and that FMBC's petition was procedurally defective.

On April 28, 2003, FMBC and Caloosa filed a joint request for approval of a settlement agreement wherein FMBC agreed to dismiss all of its pleadings, comments, objections and filings opposing station WBSP-LP's Class A Television license applications. Caloosa also filed a request for minor modification of WBSP-CA, Naples, Florida for displacement relief to operate on Channel 7 at Naples.⁷

Discussion. Although FMBC now wishes to dismiss all of its pleadings, comments, objections and filings opposing station WBSP-LP's Class A Television license application, we remain obligated under *Booth American Company*, 58 FCC 2d 553, 554 (1976), to consider the merits of the matters of FMBC's charges, notwithstanding FMBC's desire to settle its dispute with Caloosa.⁸ Based upon information before us, we find that station WBSP-LP's lapse in operating requires forfeiture of the station's broadcast license under Section 312(g) of the Communications Act of 1934, which provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary."⁹

Turning first to Caloosa's procedural arguments, we disagree that FMBC's failure to seek reconsideration of the Commission's August 11, 2000 letter decision granting Caloosa's Statement of Eligibility for Class A Status bars consideration of FMBC's petition for reconsideration of the grant of Caloosa's license application. By Public Notice released June 2, 2000, accepting Certificates of Eligibility for Class A Television Station Status (DA 00-1224), the Commission also announced that:

⁷ On November 25, 2003, Montclair Communications, Inc., the licensee of station WZVN-TV, channel 26, Naples, Florida, and its time broker, filed a petition to deny Caloosa's displacement application on channel 7 (File No. BPTVA-20030418AAE). Montclair also asked the Commission to defer consideration of the joint settlement agreement until after it acted on the petition to deny. In view of our action here, those pleadings will be dismissed as moot.

⁸ See *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3741 (1995).

⁹ See also *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996).

Commencing Friday, June 9, 2000 and continuing for a six-month period, eligible LPTV licensees may file FCC Form 302-CA to convert the secondary status of their stations to the new Class A status. Any comments directed to those applications, including the LPTV licensee's certifications of eligibility, should be filed with the Commission prior to action on those applications.

While FMBC was not able to file its comments prior to Commission action on Caloosa's license application, it explains that it was unable to do so because the application first appeared on public notice on August 10, 2001, and public notice of its grant on August 11th was released on August 15, 2001.¹⁰ Caloosa also argues that because FMBC's petition for reconsideration raises arguments that could have been raised in a petition to deny, the pleading requirements for petitions to deny set forth in Section 309(d)(1) of the Act must be met, and FMBC failed to provide any affidavits of persons with actual knowledge of the facts alleged. Even if we were require FMBC to comply with these pleading standards, matters of which the Commission may take official notice need not be supported by affidavit. Here, FMBC's petition is based on Commission records and precedent, of which we may take official notice.

Turning to the merits, as reported by Caloosa, WBSP-LP's broadcast operations had ceased on August 7, 1997, and Caloosa briefly operated the station from a temporary site between July 31 and August 7, 1999, pursuant to its July 23, 1998 STA. With respect to the assertion that the station operated briefly during June 1999, that claim is not supported by the declaration of a person with personal knowledge regarding the operations of the station. Moreover, even if Caloosa had returned station WBSP-LP to the air from June 14, 1999 to June 22, 1999, Caloosa cannot refute that such operations were not from its licensed site or otherwise authorized by the Commission. As pointed out by FMBC, the STA authorizing WBSP-LP's operation from the temporary site had expired on January 23, 1999. Clearly, such willful and repeated unauthorized broadcast transmissions, which violate Section 312(a)(3) of the Communications Act,¹¹ and constitute separate grounds for revocation of Caloosa's license, do not qualify as "broadcast signals" under Section 312(g).

Caloosa argues that even if the Bureau were to find that it violated Section 312(a)(3) through unauthorized transmissions, a monetary fine is appropriate rather than license cancellation. Caloosa relies on the case *WHRC Broadcasting Corporation*, 15 FCC Rcd 5551 (2000) ("*WHRC Broadcasting*") in support of its position that its license should not be forfeited. In *WHRC Broadcasting*, WHRC Broadcasting Corporation ("WBC") operated station WRHC(AM) on an unauthorized frequency, at unauthorized power level, for a lengthy period of time. The Enforcement Bureau found that WBC's violations were willful and intentional and issued a Notice of Apparent Liability for a forfeiture in the amount of twenty-two thousand five

¹⁰ Section 1.106(b)(1) of the Commission's rules provides that if a petition for reconsideration is filed by a person who was not a party to the proceeding, the petition will be considered upon a showing of how the person's interests are adversely affected by the action taken, and good reason why it was not possible to participate earlier. FMBC's interests are adversely affected because grant of Class A status to Caloosa would preclude grant of FMBC's request that the Commission amend the Television Table of Allotments to substitute DTV channel 9 for its out-of-core DTV channel 53 at Fort Meyers.

¹¹ 47 U.S.C. § 312(a)(3) (2002).

hundred dollars (\$22,500.00). Unlike the instant proceeding, the issue of automatic cancellation under Section 312(g) was not adjudicated in *WHRC Broadcasting*.¹² A broadcaster cannot avoid the statutory one-year silent period set forth in Section 312(g) by use of substantially non-conforming facilities if it does not seek and obtain prior Commission authorization to operate at variance from its permit or license.¹³ Accordingly, we conclude that Caloosa's license for WBSP-LP has expired as a matter of law.¹⁴

Accordingly, the Petition for Reconsideration filed by FMBC is GRANTED to the extent indicated herein; Caloosa's application to convert to Class A status (File No. BLTVA-20010712AIK) is DENIED; and the license for WBSP-LP is FORFEITED pursuant to Section 312(g) of the Communications Act and the call sign for station WBSP-LP is DELETED. In view of this action, the informal objection filed by FMBC, the applications of Caloosa to convert its modified construction permit to Class A Status (BLTVA-20020520AAQ) and for displacement relief (BPTVA-20030418AAE), and Montclair's petition to deny the displacement application and Comments on the Joint Request for Approval of Settlement Agreement are DISMISSED AS MOOT. Finally, the Joint Request for Approval of Settlement Agreement is DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Jonathan Blake, Esq.
Alan Campbell, Esq.
Roy R. Russo, Esq.

¹² At the time § 312(g) went into effect, in February 1996, station WHRC was no longer operating from its licensed daytime and nighttime facilities. However, it also held a construction permit to construct daytime facilities from a site located in Miami, and nighttime facilities from a site in Medley, Florida, and in the fall of 1996, WHRC began operating its nighttime facilities as authorized in its construction permit. While WHRC later installed a new transmitter that was set 0.6 kW above its authorized nighttime power of 4.4 kW, WHRC, unlike Caloosa, had an authorized facility at its location and continued to provide a broadcast service.

¹³ See *Idaho Broadcasting Consortium*, 16 FCC Rcd 1721, 1723 (MMB 2001) (a licensee cannot avoid the statutory deadline imposed in 47 C.F.R. § 312(g) by operating at variance from its permit without staff approval); see also *Radio Station WSTA-FM, Charlotte Amalie, VI*, 17 FCC Rcd 6147 (2002) ("Section 312(g) accords us no discretion and mandates that a station license will automatically expire as a matter of law if it does not 'transmit broadcast signals' for 12 consecutive months.")

¹⁴ We note that in reversing the dismissal of Caloosa's eligibility statement for Class A Television status, the Bureau relied on Caloosa's assertions that WBSP-LP was only "temporarily" off-air and that it had been operating as a low power television station for "most of the decade of the 1990s." Based on the record, we find Caloosa's statements to be disingenuous, particularly since, at most, WBSP-LP aired for only a limited number of days during August, 1997 through June, 2000. It is clear that station WBSP-LP was not "temporarily" off-air, but rather, was off-air for almost three years.